

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:WR:SCA:SD:TL-N-1292-00

YMPeters

date:

to: Shirley M. Ebreo, Revenue Agent FE 1417 (employment tax)  
Thru: Audie Sturta, FE 1417 Manager

from: Associate District Counsel, Southern California District, San Diego

---

subject: [REDACTED] TIN [REDACTED] Tax Years ending [REDACTED] and [REDACTED]  
Tax treatment of salary paid to nonresident alien

**DISCLOSURE LIMITATIONS**

*This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to the attorney-client and deliberative process privileges and, if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to persons beyond those specifically indicated in this statement or to taxpayers or their representatives.*

*This advice is not binding on the Internal Revenue Service and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.*

**ISSUES**

1. Whether the compensation paid to an employee by a U.S. Corporation is subject to U.S. income tax where the individual is a nonresident alien, is a resident of Canada, performs his services in Taiwan, and is within the U.S. for "business purposes" for only six or seven days each tax year.
2. Whether any portion of this compensation is subject to FICA and/or FUTA taxes.

**CONCLUSIONS**

1. Because the individual was a nonresident alien, the compensation for services he performed while outside the United States is not subject to U.S. income tax. The compensation,

if any, he received for services he performed while inside the United States for "business purposes" is subject to the U.S. income tax unless it falls within the *de minimis* exclusion provided by the U.S.-Canadian income tax treaty.

2. Compensation paid to this individual for services provided outside the United States is not subject to FICA or FUTA. Compensation paid to this individual for services performed within the United States may be subject to FICA and/or FUTA taxes. Additional information is needed to make this determination.

### FACTS

*Our advice is contingent on the accuracy of the information that the Internal Revenue Service has supplied. If any information is uncovered that is inconsistent with the facts recited in this memorandum, you should not rely on this memorandum, and you should seek further advice from this office.*

██████████ (also known as ██████████) wholly owns ██████████, a California corporation. ██████████ is also the corporate president of ██████████. ██████████ assembles and distributes manufactured ██████████ and ██████████ to approximately ██████████ retail ██████████ stores nationwide. It has ██████████ purchasing relationships with two of its ██████████ suppliers, ██████████, headquartered in Taiwan and ██████████, Canada, a Canadian corporation. ██████████ also owns these two corporations.

During ██████████ and ██████████, ██████████ maintained a home in Taiwan and in Canada. His family resided in Canada. ██████████ is a Taiwanese citizen. According to ██████████, ██████████ devotes at least ██████████% of his time conducting ██████████'s business matters. ██████████ asserts that all the services provided by ██████████ were performed abroad. ██████████ conducts his activities through fax, telephone and other modern forms of communication. The two other corporate officers travel and meet with ██████████ outside the United States whenever such a meeting is necessary. ██████████'s passport shows that he traveled to the United States six or seven days during each of the tax years at issue. According to ██████████, this travel to the United States was for business purposes.<sup>1</sup>

During ██████████ and ██████████, ██████████ performed the following functions, among others, for ██████████:

1. Determined what materials and products to buy and confirmed the quality of materials and products purchased.
2. Negotiated with suppliers and prospective suppliers on all types and quality of products, purchase terms and delivery/shipment.
3. Resolved any quality and delivery issues with suppliers.

---

<sup>1</sup> Although, as stated, ██████████ contends that ██████████ only performed services while outside the United States.

4. Researched and developed new [REDACTED] processing/finishing, design, use of alternative materials, efficient packaging, and the like, in the pursuit of reducing cost.
5. Attended [REDACTED] trade shows for new market trends.
6. Recruited and managed quality control personnel.

During the fiscal year ending [REDACTED] [REDACTED]'s books show that it paid [REDACTED] a total salary of \$[REDACTED]. During the fiscal year ending [REDACTED], its books show that he was paid a monthly salary of \$[REDACTED]. [REDACTED]'s salary was not reported on any information return such as W-2, 1099, 1042S<sup>2</sup>, etc. It was, however, reported on a Form 5472 attachment to [REDACTED]'s Form 1120. The salary payments made by [REDACTED] to [REDACTED] were deducted from the company's income on its Form 1120. Under the social security number box of statement 5 of Schedule K of the Form 1120, it is indicated that [REDACTED] is an "N.R. Alien."

[REDACTED] filed income tax returns in both Canada and Taiwan. He filed as a resident of Canada. He did not file an income tax return in the United States. [REDACTED] did not withhold any income, FUTA or FICA taxes from the salary paid to [REDACTED].

### DISCUSSION

1. Most likely, None of [REDACTED]'s Salary is Subject to United States Income Tax.

A nonresident alien is an individual who is not a U.S. citizen and does not have a tax home in the United States but does have a tax home in another country. I.R.C. § 865(g). [REDACTED] is a Taiwanese citizen, does not reside in the United States and filed returns in Taiwan and Canada. He has residences in Taiwan and Canada. [REDACTED] was employed by [REDACTED] as its president. [REDACTED]'s activities and salary appear consistent with employment as the president of [REDACTED]. See Rev. Rul. 73-361, 1973-2 C.B. 331. Although [REDACTED] is the sole shareholder of [REDACTED], as a Subchapter C corporation, it and [REDACTED] are separate entities.<sup>3</sup> [REDACTED], as a U.S. corporation, filed a U.S. income tax return, Form 1120. [REDACTED] a nonresident alien, asserts that he did not owe any U.S. income tax. He did not file a tax return in the United States.

Generally, nonresident aliens are subject to tax only on income from "sources within the United States." I.R.C. § 871(a)(1). For personal services, the place where the services were

---

<sup>2</sup> [REDACTED] was issued a Form 1042S for the amount of interest paid to him on loans he made to [REDACTED]. The Form 1042S shows [REDACTED] as his mailing address.

<sup>3</sup> There is no indication that the payments were disguised dividends or that [REDACTED]'s corporate status should be disregarded for tax purposes. Considering that [REDACTED] owns [REDACTED] and [REDACTED], the companies are related parties. No indication has been made, however, that arrangements between these companies differ from those which would have been made between unrelated parties.

performed determines the source of income. I.R.C. § 861(a)(3) and 862(a)(3). [REDACTED] provided all services outside the United States, mainly in Taiwan. He did travel to the United States for "business purposes" briefly during each of the applicable tax years, however. The compensation paid to [REDACTED] for services performed outside the United States is not U.S.-source income and is not subject to U.S. income tax.

The application of the Internal Revenue Code in this instance is also subject to certain treaty provisions. I.R.C. § 894(a). The United States and Canada have entered into an income tax treaty applicable to residents of either country. Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Sept. 26, 1980 (amended June 14, 1983, Mar. 28, 1984, Mar. 17, 1995 and July 29, 1997), U.S.-Can. art. IV, ¶ 2(a), T.I.A.S. No. 11087 [hereinafter U.S.-Canadian Income Tax Treaty]. Applicability of this treaty is determined by residency and is not limited citizens of the U.S. or Canada. Id. There is no income tax treaty between the United States and Taiwan.

Pursuant to the U.S.-Canadian income tax treaty, salaries, wages and other similar remuneration for employment paid to a resident of Canada are taxable only in Canada unless the employment is performed within the United States.<sup>4</sup> Id. at art. I and art. XV, ¶ 1. The U.S. Canadian Income Tax Treaty defines a "resident" as an individual who is liable to tax by the U.S. or Canada because of "his domicile, residence, citizenship, place of management, place of incorporation or any other criterion of a similar nature." Id. at art. IV, ¶¶ 1 (as amended) & 5(b). [REDACTED] maintains a residence in Canada, although he spends a majority of his time in Taiwan. His wife and family live in Canada. He filed income taxes as a resident of Canada. He also has significant business ties to Canada through his ownership of [REDACTED]. From these facts, the [REDACTED] is a Canadian resident and the U.S.-Canadian income tax treaty applies to him.

[REDACTED] asserts that [REDACTED] provided all his services while outside the United States. He did spend six or seven days each tax year, however, on business in the United States. When services are performed partly within and partly outside the United States, minimal services provided within the United States are also exempt from United States income tax if they meet the *de minimis* exclusion provided by the treaty. U.S.-Canadian Income Tax Treaty, art. XV, ¶ 2. The exclusion applies where (1) the amount of the wages and other similar remuneration does not exceed \$10,000 (in U.S. dollars) or (2) the recipient is present in the United States for not more than 183 days in that year and the remuneration is not borne by a U.S. resident employer or by a permanent establishment or fixed base of an employer in the United States. Id. [REDACTED] was paid approximately \$[REDACTED] month by a U.S. employer. He spent six or seven days during each tax year in the United States for business purposes. Unless he received additional remuneration for services he provided while in the United States, it is likely [REDACTED] falls within the \$10,000 *de minimis* exclusion. His earnings would therefore not be subject to U.S. income tax.

2. To the Extent the Compensation Paid to [REDACTED] Was for Services Performed While He Was Outside the United States, it is Not Subject to FICA or FUTA Taxes.

---

<sup>4</sup> This does not resolve the taxability of the income in Taiwan.

FICA and FUTA are not applicable to services provided by nonresident aliens while outside the United States. I.R.C. §§ 3121(b)(A)(i) and (b)(B); I.R.C. §§ 3306(c)(A)(i) and (b)(B). Services performed while in the United States, however, constitute services performed "by an employee for the person employing him, irrespective of the citizenship or residence of either." I.R.C. §§ 3121(b)(A) and 3306(c)(A). Therefore remuneration for services provided within the United States generally are subject to FICA and FUTA taxes.

For FUTA taxes, there is a *de minimis* exception for employers. To be required to pay FUTA an employer must pay at least \$1,500 in wages in covered employment to one or more employees or have employed at least one individual in covered employment during any of 20 separate weeks. IRC § 3306(a)(1). There is no such *de minimis* exception for FICA taxes, however. See I.R.C. §§ 3121(b) and 3121(h).

From the facts provided, it appears that [REDACTED] spent six or seven days each tax year within the United States "for business purposes." Presumably, he was compensated for these services. Unless [REDACTED] or [REDACTED] can show an exclusion applies, FICA and FUTA taxes should have been withheld on the compensation paid for services provided by [REDACTED] while he was within the United States. Rev. Rul. 92-106, 1992-2 C.B. 258.

You may wish to make a request to [REDACTED] to provide the reasons it should not be required to withhold FICA and FUTA taxes on the compensation paid to [REDACTED] for work he performed while in the United States "for business purposes." If it asserts that a treaty applies to this situation, it should provide the applicable treaty provision and information supporting the applicability of the provision.

Agreements which may apply include the Social Security Agreement Between the United States and Canada, Mar. 11, 1981, U.S.-Can., T.I.A.S. No. 10863 [hereinafter Totalization agreement] and the Agreement Between the United State of America and Canada respecting unemployment insurance benefits, Mar. 6, 1942 (amended July 31 and Sept. 11, 1951 and Oct. 29 1984 and June 21, 1985), U.S.-Can., 56 Stat. 1451 (1942) [hereinafter FUTA agreement].<sup>5</sup> For example, if it is shown that [REDACTED]'s earnings while in the United States are covered by Canadian social security, then he and [REDACTED] would not be subject to FICA taxes by the United States.<sup>6</sup> Totalization agreement, art. V, ¶ (6). See Rev. Proc. 80-56, 1980-2 C.B. 21; Rev. Proc. 84-54, 1984-2 C.B. 489 (Individuals claiming an exemption to FICA taxes pursuant to a treaty provision, must provide their employers with substantiation of this exemption. Substantiation consists of a statement of coverage from an official of the foreign country involved. If the foreign country refuses to issue such a statement then the individual should obtain a statement from the U.S. Social Security Administration.).

Similarly, the FUTA agreement is intended to prevent the duplication of unemployment

---

<sup>5</sup> There are no such agreements between the United States and Taiwan.

<sup>6</sup> This may be subject to Taiwanese-Canadian agreements, if any.

tax contributions to a State of the United States and to Canada and to prevent duplicative payments of unemployment benefits. FUTA agreement, art. IV; Rev. Rul. 79-391, 1979-2 C.B. 352. A showing that [REDACTED] is covered by Canadian unemployment insurance would exclude him from such taxes (or benefits) in the United States.

If you have any questions or would like further assistance, please contact Yvonne Peters at (619) 557-6014.

VALERIE K. LIU  
Associate District Counsel

By: \_\_\_\_\_  
YVONNE M. PETERS  
Attorney